ATTORNEY FOR APPELLANT:

JUAN GARCIA, JR.
Garcia & Crawford, LLC
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT LEE SHORTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0804-CR-162
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0506-FA-112

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Robert Lee Shorter appeals his sentence following his conviction for Aggravated Battery, as a Class B felony, after a jury trial. Shorter raises two issues for our review, but we address only the following issue: whether his sentence is inappropriate in light of the nature of his offense and his character.[1]

We affirm.

FACTS AND PROCEDURAL HISTORY

In June of 2005, Shorter severely beat Robert Lindsey. On June 25, the State charged Shorter with attempted murder, a Class A felony, and aggravated battery, as a Class B felony. In February of 2008, the court held Shorter's jury trial, after which the jury found Shorter guilty on the aggravated battery charge.

The trial court held a sentencing hearing on February 28, 2008. After hearing argument, the court stated as follows:

> Now, on February 22 the house judiciary committee addressed Senate Bill 171, which has a very direct bearing on this kind of a case. This is a bill that concerned crimes against persons with a disability. This bill, if introduced as law, would make an offense against a person with a disability an aggravated circumstance for the Court to consider during sentencing.
>
> The house judiciary committee amended the bill, and the final language ended up something like this. It can be an aggravator if the defendant knew or should have known that the victim was mentally or physically infirm[]. . . .
>
> And in this case the argument most certainly could have been made that you knew this person was mentally disabled in some way, shape, or form; and I say that because of the testimony of the mother of Mr. Lindsey who stated that he was childlike before it occurred. He must have been childlike at the time . . . immediately prior to the beating that occurred.

[1] Shorter also argues that he has the right to challenge his sentence on appeal, but that issue is not disputed. As such, we do not address it.

* * *

[I]t was a savage beating. We are lucky, Mr. Shorter, that we're not here on another murder case involving Mr. Lindsey being the victim.

I am going to consider the fact that it was a severe and savage beating, but I'm going to consider it in a different respect. I'm going to consider it only in this respect as having a bearing on your character. Character is one thing the Court can consider in sentencing. And the character I'm considering is that this man, Mr. Lindsey, was laying on the ground with his arms to his side, unconscious, unable to respond, unable to speak, and the beating continued culminating and you striking him in the face with the spring of his own mountain bike. That does have a bearing on your character, and I am going to consider it, but I'm only going to limit it to how it bears on your character.

I also note as an aggravator the fact that there was an apparent lack of motive. There was testimony in the case that you stated that the victim, quote, didn't do nothing. That fact is particularly important. It also bears on character.

The fact that you have a prior murder conviction, I say prior in the sense that the murder conviction was entered before your sentencing in your trial in this action, in that sense it is prior. It is a factor. It's a factor because it was also a crime of violence, as was your juvenile robbery case. And my recollection is in your murder case, which the Court of [A]ppeals affirmed in their [sic] decision of February 20, 2008 . . . , robbery was likewise the motive in that case. In that sense, that's at least three crimes of violence that you have, two of which are not felonies.

* * *

The other aggravator the Court will consider is the fact that the victim's bike was used as a deadly weapon. It was clear that the majority of the beating occurred by the use of your own hands. The final blow was then issued with a deadly weapon, which was the bike, and it was the manner in which the mountain bike was used that made it a deadly weapon. . . .

The fact that you have two or three misdemeanor convictions is also an aggravating factor, one of which is a deferral; and it appears that fines, costs, suspended sentences all have been tried in the adult criminal system, all without success in causing rehabilitation, or in getting your attention. That will be likewise an aggravator.

I also find as an aggravating circumstance . . . that there was an attempt by you to influence the testimony of witness Armstrong. . . . [T]here was an attempt by you to get with witness Armstrong to, quote, get your stories together.

* * *

Likewise, the Court will find an aggravator to be the fact that you left this victim lying on the ground, severely beaten. He was in dire strai[ts], languishing there, and you failed to seek medical attention for him knowing that he had been severely beaten. That's an aggravator likewise bearing on your character.

As [the State] stated, part of the beating that was administered by you was administered after Mr. Lindsey was unable to defend himself; likewise, I think that bears on your character.

There was testimony . . . that you . . . carried two handguns with you . . . . [T]here were reports of large crowds of people watching this beating occur; and yet, almost unbelievable to me, no one came to the defense of Mr. Lindsey.

[P]erhaps one of the reasons no one came to [his] defense . . . to stop you from the savage beating you were inflicting on him was that you were, in fact, carrying two handguns with you and they feared for their own safety. Likewise, that bears on your character. There was testimony from a witness by the name of Morris in the trial that Lindsey did nothing to start the fight and he was blameless. That also bears on your character.

Finally, bearing on your character[] is the fact that the statement was reported by a witness present at the time of the beating that you stated: "We don't bar none."

I was not familiar with that, and it was translated for the jury to be there is no limit to what you would do to accomplish whatever it is you set out to do. That . . . bears on your character.

You are a young man. You are 22 years of age. Any other factors mentioned by your counsel as mitigators the Court will also find to be mitigators . . . .

* * *

> It appears to me based upon the facts of this case and as I have outlined here for you in the record, there are nominal mitigating factors, and there are substantial aggravating factors. The Court weighs the aggravators . . . against the mitigators[] and finds that any one of the aggravators . . . taken alone or all of them taken in conjunction with each other[] are sufficient to warrant the full enhanced sentence of ten years to the Indiana Department of Correction[] over and above the advisory sentence of ten years.

Sentencing Transcript at 16-23. This appeal ensued.

DISCUSSION AND DECISION

On appeal, Shorter argues that "[s]everal of the trial court's aggravating factors violated the appellant's rights under Blakely[v. Washington, 542 U.S. 296 (2004)]." Appellant's Brief at 15. On that basis alone, Shorter asserts, "the maximum allowable period of twenty (20) years [incarceration] is inappropriate." Id. The State responds that Blakely does not apply to Shorter's sentence. The State is correct.

Indiana's advisory sentencing scheme, which applies to all crimes, such as Shorter's, committed after April 22, 2005, was "enacted to resolve the Sixth Amendment problem Blakely presented." Anglemyer, 868 N.E.2d at 489.

> By eliminating fixed terms, the Legislature created a regime in which there is no longer a maximum sentence a judge "may impose without any additional findings." Blakely, 542 U.S. at 304 (emphasis omitted). And this is so because for Blakely purposes the maximum sentence is now the upper statutory limit. As a result, even with judicial findings of aggravating circumstances, it is now impossible to "increase[] the penalty for a crime beyond the prescribed statutory maximum." Blakely, 542 U.S. at 301 (quoting Apprendi[v. New Jersey, 530 U.S. 466, 490 (2000)]).

Id. Accordingly, Shorter's argument that his sentence is inappropriate solely because the trial court considered aggravators in violation of Blakely is without merit. As Shorter presents no other argument on appeal, we affirm his sentence.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.